

**PUBLISHED OPINIONS**  
**KENTUCKY SUPREME COURT**  
**February 2012**

**I. CORPORATIONS:**

- A. Inter-Tel Technologies, Inc. And Inter-Tel, Inc. v. Linn Station Properties, LLC and Intergrated Telecom Services Corp.**  
**[2009-SC-000819-DG](#) February 23, 2012**

Opinion of the Court by Justice Abramson, affirming. All sitting; all concur. Integrated Telecom Services Corp. (ITS) is a wholly-owned subsidiary of Inter-Tel Technologies, Inc. (Technologies), which in turn is a wholly-owned subsidiary of Inter-Tel, Inc. (Inter-Tel). Linn Station Properties, LLC (Linn Station) obtained a default judgment against ITS for breach of their lease agreement but was unable to enforce the judgment because ITS had been deprived of all income and rendered asset-less by its parent and grandparent corporations. Linn Station then sued ITS, Technologies and Inter-Tel, seeking to pierce the corporate veil and establish Technologies' and Inter-Tel's liability for the judgment.

The Supreme Court held it was proper to pierce the ITS corporate veil to hold Technologies and Inter-Tel liable for the debt to Linn Station. Linn Station's established both elements required for a successful veil-piercing claim: (1) the parent company's domination of the subsidiary and (2) circumstances in which continued recognition of the subsidiary as a separate entity would sanction a fraud or promote injustice. Technologies and Inter-Tel exercised complete dominion and control over ITS, deprived it of a separate existence, and derived the benefits associated with the Linn Station lease while rendering ITS an income-less and asset-less shell incapable of meeting its lease obligations.

The Supreme Court clarified that no single test is required to determine when to pierce the corporate veil, but rather courts should focus on the elements of (1) domination and (2) sanctioning fraud or promoting injustice, and should use the provided list of equity factors when making its determination. Specifically, while the second prong may be satisfied by either sanctioning fraud *or* promoting injustice, the injustice must be some wrong beyond the creditor's mere inability to collect from the corporate debtor. Further, a court need not sequentially pierce the veil of each related entity but may view such entities collectively and pierce the veil of any related entity where the facts justify doing so. Nor is a piercing action precluded when that claim was not part of the original debt collection suit. In some cases, the creditor may know enough to proceed against all potentially liable parties but, in other instances, it may be appropriate to obtain the judgment first and only when it proves uncollectible seek relief through veil-piercing litigation. Finally, a default judgment against a subsidiary is enforceable against the parent company once the corporate veil has been pierced, even if the parent company was not "before the court" by name when the judgment was entered because, due to the piercing, the parent is deemed to have actually been present.

## II. CRIMINAL LAW:

### A. **Michael Dunn v. Commonwealth of Kentucky**

[2010-SC-000234-MR](#)

**February 23, 2012**

Opinion of the Court by Justice Noble, affirming. All sitting; all concur. Dunn was convicted of five counts of first-degree sodomy. He claimed that the trial court erred by denying his motion to suppress evidence that was seized during a warrantless search of his property. The Court affirmed the trial court's ruling because the area that was searched was land that was not part of the house or its curtilage, and therefore it did not fall under the protection of the federal Fourth Amendment or Section 10 of the Kentucky Constitution. The area that was searched was a wooded area more than 300 feet from Dunn's house that was used for hunting and four-wheeling, not private activities of the home.

Dunn also claimed that the trial court had erred by failing to order the Commonwealth to produce a bill of particulars, by not allowing the defendant to enter evidence that the victim had previously accused someone of sexual abuse, by refusing to provide to the defense certain portions of the victim's psychotherapy records, by denying his motion for a change of venue, and by declining to excuse for cause two jurors who had family members who had been victims of sexual abuse. Finding no reversible error on any of these issues, the Court affirmed Dunn's convictions.

### B. **Joseph Thomas James v. Commonwealth of Kentucky**

[2010-SC-000275-MR](#)

**February 23, 2012**

Opinion of the Court by Justice Noble, affirming. Minton, C.J.; Abramson, Cunningham, and Scott, J.J., concur. Schroder, J., concurs in result only. Venters, J., concurs in result only by separate opinion.

James was convicted of first-degree rape, first-degree unlawful imprisonment, fourth-degree assault, violating a protective order, and being a persistent felony offender. James beat the victim, his girlfriend, for approximately five hours, breaking her jaw, nose, and several ribs, and causing other serious injuries. When he took a break from beating her, the victim saw that he had an erection. When he came back across the room to her, he kissed her. The victim at that point believed that if she had sexual intercourse with him, he would stop beating her. The two then engaged in sexual intercourse.

James argued that the Commonwealth failed to prove the forcible compulsion element of first-degree rape because, he claimed, there was no proof that the violence was a means to secure sexual intercourse. The Court held that, under the evidence presented in this case, a reasonable jury could believe that James had implied a threat of further violence in order to accomplish sexual activities and that the victim submitted to the threat because she feared further violence. Thus,

the trial court was affirmed on this issue.

James also claimed that the Commonwealth had failed to turn over exculpatory evidence that the victim had told investigators that she had “initiated” the sexual intercourse. Review of the victim’s pre-trial statements as well as her testimony on this issue revealed that she did not consider herself a rape victim, but that she had always said that she did not want to have sex that night and that she had started the sex (or “gone along” with the sex) in order to get James to stop beating her. The Court found that all the statements the victim made were consistent with what was provided to the defense before trial. And the victim’s belief that what happened to her was not rape was not exculpatory evidence because it was merely her own legal conclusion. Therefore, there was no *Brady* violation.

James also claimed that the medical records entered into evidence contained prejudicial hearsay. There were several references to “rape victim” or “sexual assault” in the medical records. While some of these statements were inadmissible, admitting them into evidence was harmless error.

James claimed that his entire statement to the police should have been admitted under the rule of completeness. Because the meaning of the statements that were admitted was not distorted by exclusion of other statements made by the defendant, the trial court did not err.

Finally, the Court found that there was no error in admitting prior statements of the victim for rehabilitation purposes. For these reasons, James’ conviction was affirmed.

**C. Britton L. McPherson v. Commonwealth of Kentucky**  
**[2010-SC-000379-MR](#) February 23, 2012**

Opinion of the Court by Justice Abramson, affirming. All sitting; all concur. Defendant was convicted of murder for having shot to death an acquaintance and was sentenced to life in prison. Upholding both the conviction and the sentence, the Supreme Court held (1) that the court’s exclusion of evidence that the defendant’s accomplice, a witness against him, had years before threatened to kill someone and had, on other occasions, accused friends and acquaintances of minor crimes did not violate the defendant’s rights to confront the witness and to present a defense; (2) that the court’s refusal to give a missing evidence instruction was proper since the allegedly missing evidence—a detective’s preliminary notes—had not been shown to be exculpatory or to have been destroyed in bad faith; and (3) that the court’s impaneling a second sentencing jury when the original jury could not agree on a sentence did not violate KRS 532.055’s judicial sentencing provisions since this was a capital case requiring additional fact finding by the sentencing jury.

**D. Bradley Allen Day v. Commonwealth of Kentucky**  
**2009-SC-000641-DG** **February 23, 2012**

Opinion of the Court, reversing and remanding. All sitting; all concur. Defendant moved out of state after being questioned by law enforcement officers regarding alleged sexual abuse of a minor. Shortly thereafter, defendant was indicted on charges of sodomy. At trial, the Commonwealth presented evidence of Defendant's move as "flight evidence" and presented expert testimony regarding the scientific testing of the physical evidence in the case. Based on the evidence, the jury was instructed on sodomy and sexual abuse. Over Defendant's objection, the trial judge informed the jury that the penalty was one to five years' imprisonment. Defendant was convicted of sexual abuse and sentenced to three years' imprisonment.

On appeal, Defendant raised the following issues: 1. whether the trial court erred by answering a jury question requesting the penalty range for a lesser included offense during guilt phase deliberations; 2. whether the trial court erred by admitting evidence regarding the defendant's move to West Virginia as "flight" evidence; 3. whether the trial court erred by admitting forensic evidence where the Commonwealth could not demonstrate a chain of custody and the Commonwealth failed to timely turn over discovery regarding this evidence; and 4. whether the prosecutor's comments were an improper appeal to local sympathy.

The Court held that the trial court erred by telling the jury the penalty range for the lesser included offense during guilt phase deliberations. *Commonwealth v. Philpott*, 75 S.W.3d 209, 213 (Ky. 2002) ("[I]n the trial of a 'felony case,' i.e., any trial in which a jury could return a verdict of guilty of a felony offense, the jury shall not be instructed on the penalty ranges of any offense, whether the primary or a lesser included offense."). Therefore, the Court was compelled to reverse and remand the case for further proceedings. With respect to the other issues raised by Defendant, the Court held that the evidence of flight was permissible on rehearing; the trial court did not err by admitting the forensic evidence despite the Commonwealth's failure to establish chain of custody; and the Commonwealth's comments were not an improper appeal to local sympathy.

**III. DOMESTIC RELATIONS/ FAMILY:**

**A. Kathleen Woodward Mitchell and Miller, Griffin & Marks, P.S.C. v. Richard M. Mitchell, Jr.**  
**2010-SC-000722-DG** **February 23, 2012**

Opinion of the Court by Justice Cunningham, reversing and remanding. All sitting. Minton, C.J.; Noble, Schroder, Scott and Venters, JJ., concur. Abramson, J. concurs in result only. Richard brought a motion to modify spousal maintenance due to Kathleen under their separation agreement. In response, Kathleen filed a motion for fees and costs under KRS 403.220. In its order, the trial court denied the motion to modify maintenance, but failed to address the motion for fees and costs. Over two months later, the trial court granted the

motion for fees and costs and awarded Kathleen \$19,161.80. Richard appealed arguing that the trial court no longer had jurisdiction to grant the motion. The Supreme Court held that the trial court was not divested of jurisdiction because the motion for fees and costs constituted a separate claim for purposes of CR 52.02 and CR 54.02. Justice Abramson concurred in result only.

**IV. JUVENILE CRIMINAL:**

**A. K.R. (A/K/A J.W.), A Child v. Commonwealth of Kentucky**  
**2010-SC-000076-DG February 23, 2012**

Opinion of the Court by Justice Noble, affirming. Minton, C.J.; Abramson, Cunningham, Schroder, and Scott, J.J., concur. Venters, J., concurs in result only. This case is an appeal from the Court of Appeals' affirmance of entry of a writ of mandamus by the Jefferson Circuit Court requiring the Jefferson District Court to transfer K.R. to circuit court as a youthful offender pursuant to the mandatory transfer language in KRS 635.020(4) when a firearm is used in commission of a felony offense. The Court found that the writ of mandamus was an available remedy because this case fell into the "special cases" category in which writs are available.

Considering the merits of the Commonwealth's claim, the Court found that a crime committed by complicity can fall under the mandatory transfer provision. And the Court found that the district court erred in finding that a firearm was not "used" in K.R.'s offense. For these reasons, the writ of mandamus issued by the circuit court was appropriate and the Court of Appeals is affirmed.

**V. SUMMARY JUDGMENT:**

**A. Thomas J. Schultz v. General Electric Healthcare Financial Services, Inc., et al.**  
**2010-SC-000183-DG February 23, 2012**

Opinion of the Court by Justice Scott, reversing and remanding. All sitting; all concur. In this case, the trial court pierced Intra-Med's corporate veil based solely on the pleadings, thereby allowing Appellees to obtain its judgment against Appellant. On appeal, the Supreme Court noted that the piercing doctrine arises in equity and that trial courts should therefore be very reticent to pierce based solely on the pleadings. As such, the Court held that the trial court improperly granted judgment on the pleadings in light of its obligation to evaluate fairness and hardship and the absence of material facts definitively showing harm, fraud, or unjust loss.

**VI. ATTORNEY DISCIPLINE:**

**A. Kentucky Bar Association v. Donald H. Morehead**  
**2011-SC-000608-KB February 23, 2012**

Opinion and Order. All sitting; all concur. The Court adopted the Board of Governor's recommendation to suspend Morehead from the practice of law for sixty-one days.

**B. Kentucky Bar Association v. Eric Deters**  
**[2011-SC-000641-KB](#) February 23, 2012**

Opinion and Order. All sitting; all concur. The Court found Deters guilty of SCR 3.130-8.2(a), SCR 3.130-3.3(a), SCR 3.130-7.09(2), and SCR 3.130-1.16(d) and suspended him from the practice of law for sixty-one days.

**C. Kentucky Bar Association v. Donald Lynn Richardson**  
**[2011-SC-000654-KB](#) February 23, 2012**

Opinion and Order. Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., concur. Schroder, J., not sitting. All concur. Richardson committed multiple violations of the Rules of Professional Conduct, and he was convicted of the felony criminal offense of bank fraud. The Court adopted the KBA Board of Governor's recommendation that he be permanently disbarred.

**D. Kentucky Bar Association v. J. Baxter Schilling**  
**[2011-SC-000657-KB](#) February 23, 2012**

Opinion and Order. All sitting; all concur. The Court publicly reprimanded Schilling upon finding him guilty of four counts of professional misconduct.

**E. Daniel Louis Thompson v. Kentucky Bar Association**  
**[2011-SC-000734-KB](#) February 23, 2012**

Opinion and Order. All sitting; all concur. The Court granted Thompson's motion to issue a public Opinion and Order imposing a sixty-one day suspension, thirty-one days of which were probated for two years provided Thompson complied with several conditions.

**F. Kentucky Bar Association v. James A. Earhart**  
**[2011-SC-000743-KB](#) February 23, 2012**

Opinion and Order. All sitting; all concur. Supreme Court entered an order subjecting Earhart to reciprocal discipline in Kentucky for unprofessional conduct he committed in Indiana. Earhart's conduct would violate SCR 3.130-1.5 and SCR 3.130-1.16(d). Earhart was suspended from the practice of law in Kentucky for a period of 30 days.

**G. Stephen R. Chappell v. Kentucky Bar Association**  
**[2011-SC-000746-KB](#) February 23, 2012**

Opinion and Order. Minton, C.J.; Abramson, Cunningham, Schroder and Venters, JJ., concur. Scott, J., dissents. Noble, J. not sitting. The Court imposed a public reprimand to resolve pending disciplinary matters against Chappell.

**H. Steven Joseph Megerle v. Kentucky Bar Association**  
**[2011-SC-000011-KB](#) February 23, 2012**

Opinion and Order. All sitting; all concur. The Court publicly reprimanded Megerle after he admitted violating SCR 3.130-1.3, 3.130-1.4(a), 3.130-1.4(b), and 3.130-8.3(b).